United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7358

To be argued by
C. DICKERMAN WILLIAMS

B
P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM F. BUCKLEY, JR.,

Plaintiff-Appellee,

v.

FRANKLIN H. LITTELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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BRIEF FOR PLAINTIFF-APPELLEE

The Issues

We disagree with defendant's statement of the issues; primarily because the statement overlooks the fact that this is an appeal from a judgment based on findings of fact by the Trial Court, and, as regards those findings, the issue is, were those findings "clearly erroneous" (Rule 52)?

We accordingly restate the issues as follows:

1. Was the Trial Court "clearly erroneous" in finding:

   A. That defendant made the statements that the Court found that he made.

B. That the statements were false.

C. That the statements were known by defendant to be false (or made with reckless disregard of whether they were true or not).

D. That the punitive damages awarded plaintiff were reasonable.

2. Was defendant libel-proof?

3. Were defendant's statements "protected opinion, epithet and rhetoric" beyond the requirement that plaintiff show "actual malice" as defined in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), and successor cases?

Statement of the Case

The trial.

The case was tried before Hon. Thomas P. Griesa. Both sides had waived a jury. During the discovery and the first part of the trial there were two defendants, the Macmillan Co. and Little. The Macmillan Co. settled in the course of the trial after the testimony of the Macmillan witnesses.

In substance there were two interdependent issues, first, was Buckley a "fellow traveler" of "fascism" as those terms were defined in defendant's book *Wild Tongues*?*

The second issue, in substance a group of subissues, related to various kinds of journalistic misconduct of which defendant accused Buckley after describing him in general terms as the outstanding fellow traveler of fascism (book,** p. 51). The implication from the context was that

* The expression "Wild Tongues" is taken from Kipling's "Recessional."

** *Wild Tongues* will sometimes be referred to as the "book" herein.

Buckley advanced, or sought to advance, the cause of fascism by this alleged journalistic misconduct.

Whatever might be the legal effect of terms such as "fellow traveler" and "fascism" *per se,* or used in isolation, in this particular instance the issue was whether Buckley was defamed by being described as the "outstanding representative" of fascist fellow travelers in accordance with the explicit definitions of those terms in the book, the purpose of which was declared by Littell to be a guide to political extremists, in the interest of clarifying polemical discussion and persuading Christians to avoid them.* The question thus, by virtue of these definitions, becomes whether Buckley was fascinated by brute force and its misuse, functioned as a deceiver, followed the party line, lent an aura of respectability to simple thuggery, approved or condoned totalitarianism, sadism and violence, the burning of synagogues, the defacement of Jewish buildings, the "use of the knife" etc., these being among the characteristics of fascists and their fellow travelers. Book, pp. 50-51, 95-115; *infra* pp. 10-20.

After Buckley and witnesses called by him had testified in denial of the book's charges, the defendants' witnesses were examined. After the examination of the Macmillan witnesses, Macmillan settled the case against it. The remainder of the trial consisted of an extensive examination of defendant Littell, both by counsel and the Court. During the remainder of the trial, Littell was represented by David Blasband, Esq., as a friend of the Court. Mr. Blasband had been Macmillan's counsel during both the discovery and the trial. Mr. Blasband's representation included cross-examination, making objections, summing up and submitting a post-trial brief on behalf of Littell.

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* See *Derounian* v. *Stokes,* 168 F. 2d 305 (10th Cir. 1948).

In the examination of Littell it soon became apparent that what he had relied on could not possibly be regarded as showing that Buckley was a fascist or fellow traveler of fascism, as Littell himself had defined those terms in the book,* but according to Littell, did show that Buckley was in the "orbit" of the "radical right". AI, 56. The only definition of "radical right" in *Wild Tongues* was "a phrase . . . preferred by some writers who do not want to use the precise rubric which is fascism". P. 60 of the book; AII, 543, 394 F. Supp. 977.

On the other hand, in his testimony and referring to it, as distinguished from the book, Littell said that he used the expressions right wing and radical right "pretty much interchangeably." AII, 153. He was forced to say this, because his evidence did no more than show that Buckley was right wing.

The Facts.

The facts are largely stated in Judge Griesa's opinion. Our own statement of facts is intended to supplement the opinion with a view to correcting various misapprehensions which might be created by plaintiff's brief. We discuss these facts under the point headings to which they relate. The text of Littell's libel of Buckley is set forth at pp. 4-4a of appellant's brief.

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* Indeed on this appeal Littell explicitly concedes that, contrary to his book, "he did not believe Buckley was a fellow traveler of fascism." Brief for Appellant, p. 13, citing testimony of Littell. It is difficult to see what remains of Littell's case after this concession in the light of his definitions of fellow traveler and fascism, *infra* pp. 10-20.

POINT I

The Examination of Littell Was Proper.

On this appeal defendant complains, among other things, that Littell was questioned about his sources. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), holds that it is incumbent upon a plaintiff who is a public official in a libel action to show the defendant's state of mind (that is, that he knew that what he said was false or spoke with reckless disregard of whether it was true or not). Hence a plaintiff public official, and, since *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), a public figure, is in the ordinary libel case forced to examine the defendant as to his sources, and indeed such is the usual procedure. *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), motion for summary judgment denied, 261 F. Supp. 784 (S.D.N.Y. 1966). Both this Court and the District Court relied primarily on the examination of the defendant in *Goldwater* v. *Ginzburg* for their conclusions that there was a prima facie case that defendant did not believe his assertions.

Defendant also complains that he was examined respecting his beliefs. Of course, Littell was examined only concerning his "beliefs", or state of mind, with respect to the defamatory passage; he was not examined about his beliefs in general. As *New York Times* makes clear, the defendant's beliefs (in this limited sense) are the principal issue in this type of case; the proposition necessarily follows that the defendant is subject to examination respecting them. As the Supreme Court said in *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968):

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure

a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

POINT II

Buckley Is a Responsible, Conservatively-Minded Journalist.

There is little to add to he description in the opinion of Buckley as a distinguished conservative journalist and publicist. AII, 538; 394 F. Supp. 922. The opinion also summarizes the reputation testimony of Allard Loewenstein, a well-known liberal who testified that, among liberals, there is disagreement with Buckley on matters of policy, but high regard for his integrity. Page 922.

POINT III

Buckley Is Not Libel Proof.

For his extraordinary proposition that plaintiff is "libel proof", defendant relies on *Cardillo* v. *Doubleday & Co.*, 518 F. 2d 638 (2d Cir. 1975).

In *Cardillo* the plaintiff was a private figure involved in matters of public interest. The District Court held, on the basis of *Rosenbloom* v. *Metromedia, Inc.*, 463 U.S. 29 (1971), on a motion for summary judgment, that actual malice had not been shown, and dismissed the complaint accordingly. The affidavits had shown that plaintiff was an habitual criminal, was then serving a 21 year sentence for various felonies, admitted many of defendant's assertions and denied so few as to admit that the

book's portrait of him was substantially correct. Meanwhile, while Cardillo's appeal from the District Court judgment was pending, the Supreme Court in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), clarified or overruled *Rosenbloom* so as to hold that *New York Times* did not apply to a private figure involved in a matter of public interest. Therefore proof of actual malice was unnecessary. *Rosenbloom* no longer being available, this Court held that plaintiff's reputation was so infamous that his chances of recovery were negligible and upheld the dismissal.

In this instance Buckley's reputation is good and it is most important to him to keep it that way. At the time of trial his TV program "Firing Line" was subscribed to by 75 stations and his column "On the Right" by 250 newspapers. As noted by the Court, AII, 547, 394 F. Supp. 931, Steibel, manager of Buckley's TV program, and Elmlark, manager of his column, both testified that if Littell's charges were to gain credence, that would be the end of both the TV program and the column. Buckley's own testimony was to the same effect. AI, 115.

To allow *Wild Tongues* to go unchallenged would, under *New York Times,* open the door to any enemy of Buckley to make accusations against him similar to those made in *Wild Tongues* on the authority of that book on the theory that he had not shown "reckless disregard" of the truth because he had read and relied upon *Wild Tongues.* This is especially true because the book was published by Macmillan, "an extremely distinguished publishing house with a reputation that gave a special carriage to its publications". AI, 118.

Defendant has cited no case in support of his "libel-proof theory" relating to a plaintiff who had a good reputation and whose livelihood depended on keeping it.

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POINT IV

Appellant's Statements Are Not "Protected Opinion, Epithet or Rhetoric" Supported by Facts Correctly Stated, But on the Contrary Are Factually Untrue and Defamatory.

It is of course true that opinion, as such, is largely protected under the law of libel, not only by *New York Times Co.* v. *Sullivan,* but also by the pre-existing doctrine of "fair comment". Cf. *Julian* v. *American Business Consultants,* 2 N.Y. 2d 1 (1956), and cases there cited.

In brief, this doctrine is that extremely harsh characterizations are permissible if based upon unchallenged facts. *Greenbelt Coop. Pub. Assn.* v. *Bresler,* 398 U.S. 6 (1970). In *Greenbelt* the plaintiff owned property wanted by a city for a school site. The defendant published an account of a meeting in which the positions taken by the plaintiff in his negotiations with the city authorities were characterized as "blackmail". The Court held that this characterization could not be regarded as actionable, the facts upon which it was based having been correctly stated, but not constituting the legal crime of "blackmail".

Here, if defendant had characterized as "fascist" or some other derogatory expression some act or speech by defendant, there might well not be a cause of action, assuming that the act or speech was truthfully stated.

But defendant in this case took pains to define his epithet factually. As already noted, the purpose of the book was declared to be clarification of the difference between "honest conservatives", liberals and totalitarians of either the Communist or the fascist variety.

On the jacket of *Wild Tongues* it is described as a "perceptive and trenchant analysis of extremism, [which]

provides an authoritative guide to an understanding of the political and religious threats posed by both the far right and far left. In this pioneering work in establishing a typology of pathological movements and parties, Franklin H. Littell both defines the enemies of liberty and self-government . . . He spells out, in specific terms, what extremist groups mean to American life and supplies a checklist by which the pathological organization can be recognized."

The admissibility of the book.

Defendant challenges the right of the Court to consider anything in *Wild Tongues* other than the passage quoted in the complaint. The entire book, including the jacket, was received in evidence without objection as PX9 (AI, 43). It is well settled that whatever is received in evidence without objection may be used as evidence whether or not within the pleadings which are deemed amended accordingly.

According to Rule 15(b):

> "Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon the motion of any party at any time, even after judgment; but failure so to amend does not affect the trial of these issues."

In Moore's discussion of this Rule, he says (*Federal Practice*, 2d Edition, vol. 3, pp. 989-991):

> "An amendment to conform to evidence may be made at any time on motion of any party, even in the appellate court, . . . In any event, the lack of an amendment does not affect the judgment in any way. In effect, therefore, the parties may, by express consent, or by

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> the introduction of evidence without objection, amend the pleadings at will."

Moore cites many cases for this proposition including two decisions of this Court: *Purofied Down Products Corp.* v. *Travelers Fire Insurance Co.*, 278 F. 2d 439 (2d Cir. 1960), and *Gulbenkian* v. *Gulbenkian*, 147 F. 2d 173 (2d Cir. 1945).

Mr. Blasband objected only to receiving evidence as to meanings which were "outside the book". (A1, 49). The implication was that whatever was in the book was admissible.

The Court made clear his view that, whatever the pleadings, the entire book was to be considered in defining the libelous passage, AI, 177; cf. 176:

> "The entire book is in evidence and I would like to say to counsel that I think that the only realistic way to approach it is to consider the book as a whole, or those portions of it which are relevant in defining what is meant by the terms in these two pages." (i.e. pp. 50-51).

Littell asked the Court to explain his remark. The Court did so, and Littell thanked him. AI, 178-180. Mr. Blasband made no comment.

Littell's Definitions of "Fellow Traveler" and "Fascism"

Two questions must be resolved concerning Littell's description of Buckley as a "fellow traveler" of "fascism". What is a "fellow traveler"? With what organizations does Buckley have a "fellow traveler" relationship?

The quoted passage from pp. 50-51 specifies the "fellow traveler" relationship very clearly. The fellow traveler "functions as a deceiver. He appears at times to be in-

dependent, but, when a major issue is at stake, he follows the party line."

Other portions of *Wild Tongues* make the analysis even clearer. At p. 131, in particular, it is stated:

> " 'Fellow-traveling' is to follow a 'line' fixed by someone else in another place, while pretending to integrity—and independence of discussion and decision."

Of course, there is a distinction between fellow traveling and overt party membership, since the fellow traveler "refuses to accept discipline" (p. 50). Accordingly, *Wild Tongues* concedes that Buckley "is probably not under the direct control of any subversive party" (p. 52); but this is a meaningless distinction, in terms of the condemnation provided by *Wild Tongues*. It is stated at p. 133:

> " . . . those whose 'fellow-traveling' with the totalitarian left and right has shown a pattern of consistency across years are little different from party members as credible witnesses."

The case is put even more forcefully at p. 115:

> "For the loyal Christian citizen, membership in or fellow-traveling with caucuses and conspiracies of a totalitarian type should be enough in itself to disqualify any person from holding public office. And it should go without saying that no person under ideological revolutionary discipline to communism or fascism or racism can be a member in good standing in a Christian church."

The moral condemnation is also stated explicitly at p. 68:

> "On the practical side, it is now perfectly possible to distinguish honest liberalism from fellow-traveling with the Communists, and honest conservatism from fellow-traveling with fascist-type movements. The failure to make such distinction, scientifically as possible as the distinction between measles and scarlet fever, is the major plague afflicting both the Republican and Democratic parties in the United States."

In sum, the fellow traveler is a "deceiver" who "appears at times to be independent" but "follows the party line" (p. 50); that is, he follows "a 'line' fixed by someone else in another place, while pretending to integrity" (p. 131). As a result his role is "dangerous to social health" and "important to building up totalitarian parties" (p. 50).

This description is accompanied by a number of slurs of a more specifically personal nature. The fellow traveler is described as "whisking" and "pirouetting", his responses "essentially feminine" (p. 50). The implication of sexual deviation or abnormality is perfectly clear. Beset with a "fascination of brute force and its misuse", he harbors a "'psychology of the pawn'—his need to be misused and abused, to the destruction of his own personhood" (p. 50; compare p. 81 as to the "psychology of the pawn").

We next address the second question to be considered. With what movements or organizations is Buckley accused of having a fellow traveler relationship?

Again, the language at pp. 50-51 is perfectly clear and unambiguous. The fellow traveler is at the edges of a "totalitarian movement". He is "important to building up totalitarian parties". Then there is a very direct and specific reference to the "fellow traveler to the Communists or fascists".

Only [illegible] examples of the role are provided. First we have "the most famous type in recent years" (p. 51), Von Ribbentrop,

> ". . . pseudo-intellectual and champagne salesman, who was of great use to the Nazi government in giving an aura of respectability to international policies which, without a debonair front, might have been recognized readily for what they were: simple thuggery." (P. 51.)

Without a break, we pass from Von Ribbentrop to "the outstanding representative of the function" in America, William F. Buckley, Jr.

The meaning is perfectly straightforward. Buckley is a fellow traveler of totalitarian movements and totalitarian parties of a fascist nature. Direct analogy is made to a famous Nazi functionary.

At pp. 59-60, it is made clear that the phrases "radical right" or "extremist", in the lexicon of *Wild Tongues*, mean "fascist" anyway. At p. 59, the author complains that "although the terms 'extremism' and 'radical right' are widely used, they lack precision," although the author will occasionally use them "to save time and avoid endless repetition of the same word"; *i.e.*, "fascist".

He explains further (pp. 59-60):

> "The term 'extremism' carries the implication that the basic problem is one of intensity of opinion—as though a person of mediocre views and lukewarm opinions were preferable to one of sturdy convictions. This is manifestly not the case, certainly not for Christians. . . . It is not intensity of opinions we are talking about, but the truth itself . . . So too with the term 'radical right': the phrase is preferred by some writers who do

> not want to apply the precise rubric, which is fascism . . . 'Fascism' is the term to apply to parallel movements and systems today, even though specialists note technical differences between Italian fascism, German Nazism, Spanish Falangism, and other radical right movements."

The references to "fascist" and "totalitarian" on pp. 50-51 are part of an endless, repetitive pattern throughout the book. The term "fascist" or "fascism" is used or discussed at pp. 2, 4, 10, 12, 21, 26, 29, 30, 31, 33, 35, 36, 38, 40, 41, 43, 44, 45, 48, 50, 51, 52, 60, 62, 63, 66, 67, 68, 70, 71, 74, 75, 76, 77, 78, 81, 83, 89, 91, 94, 95, 98, 100, 101, 102, 105, 110, 113, 115, 122, 131, 132, 139, 140, 141, 142, 145, 147, 154, 163 and 164. The term "totalitarian" or "totalitarianism" is used or discussed at pp. 3, 4, 21, 43, 44, 63, 65, 67, 68, 69, 70, 71, 72, 73, 74, 76, 78, 80, 81, 82, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 99, 103, 104, 105, 107, 108, 110, 112, 113, 114, 115, 117, 125, 130, 133, 138, 140, 141, 142, 143, 144, 145, 146, 147, 152, 153, 154 and 155. The occasional substitution of "radical right" or "extremist" for "fascist" does not vary the meaning, and is intended simply "to avoid endless repetition of the same word" (p. 59), an end but imperfectly achieved.

The full import of the characterization intended can only be grasped by a review of the context in which these terms are used; *i.e.*, the surrounding passages of *Wild Tongues*.

The book is subtitled "A Handbook of Social Pathology", and the concept of the "pathological totalitarian style" is stressed at the outset (p. xi). Pathology is a recurring theme thereafter (pp. 14 ("illness"), 31, 36, 38, 83, 84, 93, 109 ("paranoid"), 125, 130, 132, 138, 158).

The totalitarians "have in fact drawn the knife against all who stand in the way of their drive for power" (p. 65). This idea is reiterated at pp. 75 ("reversion to the law of the knife"), 102 ("the rule of the knife"), 103 ("the rule of the knife"), 112 ("those who . . . use the knife"), and 125 ("revert to the old rule of the knife"). They are "flesh eaters" (pp. 43, 72), to be suppressed by violence to the extent necessary (p. 72; see also p. 119). Or again, nicely avoiding endless repetition, they are "well poisoners" (pp. 42, 85), or "grave diggers" (p. 85).

The addiction of totalitarian and fascists to anti-Semitism is strongly stressed (pp. 9, 10, 72, 95, 96, 98, 99, 141, 142, 148, 155, 169, 172); "totalitarian groups engage in the bombing of synagogues, defacement of Jewish buildings and cemeteries, slander of Jewish community leaders and public officials. . . ." (p. 95). The John Birch Society, which is singled out as a prototype fascist organization at p. 2 ("prominent fascist-type conspirac[y]"), and is thereafter a major object of attention (pp. 13, 14, 21, 35-6, 37, 40, 41, 42, 43, 44, 63, 64, 75, 82, 94, 100, 112, 114, 118, 130, 131, 148, 170), "shows striking parallels to the Nazi party" (p. 45). The Nazi theme is woven throughout the book (pp. 41, 56, 80, 98, 140, 144). Racism is also attributed to the fascists and totalitarians (pp. 10, 25, 53, 111), as is demagoguery (pp. 20, 36, 89, 100, 116, 117, 118, 119).

The fascists and totalitarians are accused of "political pornography" (pp. 66, 124), "irreverence, slander, lying, deceit, violence, conspiracy, schism" (p. 15), "betrayal of the people" (p. 42), use of "the deliberate smear" (p. 50), "disrespect for the dignity and integrity and liberty of the human person and . . . brutal mistreatment of the person or group of dissenting conscience" (p. 76), approval of "brain-washing, mental and physical torture, and liquidation . . ." (p. 77), "praise of violence" and "delight in the

use of brute force" (p. 82), "a new style of treason in our time" (p. 83), "espionage, subversion and conspiracy" (p. 83), "manipulation of mobs" (p. 84), destruction of reputations (p. 85), and "terrorization" (p. 85). They want to "loose the police or the stormtroopers upon protesting citizens" (p. 87); the concentration camp is "the symbol of the totalitarian system" (p. 87). "The cult of the renegades is cultivated" (p. 90). "Parades replace discussion, symbols (including slogans) replace reasoned discussion, street fighting and the rule of the knife mark the regression to the primitive short-cuts to consensus" (p. 103).

The screed continues with references to "mob action" (p. 104), "symbols of sadism and violence" (p. 108), "cross burnings and lynchings" (p. 108), "vulgar and vicious forms of sedition" (p. 108), "unpunished arson and murder" (p. 108), "mob demonstrations, mob violence, and the 'trial' of public figures in mob assembly" (p. 108), "attack on constitutional government" (p. 109), "total revolution" (p. 110), "death to human liberty" (p. 112), "lust for power" (p. 112), "subversion" (p. 112), "ideological warfare" (p. 112), "those who strike at the vitals of civilized life" (p. 113), "passionate hatred and malice" (p. 119), "envy" (p. 119), "poisonous and cancerous . . . fascist propaganda" (p. 122), "subversive politics" (p. 124), "political adventurers" (p. 124; see also p. 138), "witch doctors" (pp. 124 and 128), "secret terror" (p. 146), "fear and smear" (p. 170), and "half truths and lies" (p. 170).

This litany of denunciation is interspersed with references to fellow travelers, in addition to the passage at pp. 50-52 which constitutes the basis of the instant litigation and the other passages (pp. 68, 115, 131, and 133) quoted earlier herein. At p. 42, the reader is referred to "the well-poisoners in America, notably the John Birch Society and fellow travelers" (p. 42). P. 111 deals with "fellow

travelers among the weak and uncertain", p. 122 with "persons under radical right discipline or else fellow traveling with them", p. 130 with "fellow-traveling" magazines or organizations" which "whirl in orbit about one of the totalitarian centers of disciplined action"; reference is made at p. 132 to a "renegade fellow traveler".

The most slashing attack on the fellow traveler to the fascists (aside from the specific slanders against Buckley) is made at p. 36:

> "The pseudo-conservative follows the lead of the demagogues, with a frenzy of unrestrained attacks on public policy and a minimal offering of constructive alternative proposals. Regarding the public debate as meaningless, the totalitarian demagogue is only present to evangelize his own ideology—never to learn. Tearing and rending public confidence in the Constitution (and Bill of Rights!) where he can, *his style is conspiracy, and his stench is disloyalty.* The pseudo-conservative is the 'patsy', *the fellow traveler to the fascists;* the genuine conservative is their mortal enemy." (Emphasis added.)

The Peculiarity of Selecting a "Fascist"

In this context of discussion occurs a section entitled "The Fellow-Traveler" specifically dealing with Buckley and almost entirely quoted in the complaint.

Preliminarily, however, to our discussion of this passage, we remark that to explain the meaning of the word "fellow traveler" by referring to an alleged fellow traveler of fascism is prima facie peculiar and suspicious. The expression "fellow traveler" first came into usage in the 1930's and 1940's when a number of public figures displayed sympathy for Communism and the Soviet State, albeit denying membership in the Community party. That

party was known to subject its members to severe discipline. Defendant could have given many illustrations of Communist fellow travelers, for instance, Linus Pauling, of whom this Court had occasion to say in *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659 (1964), that on the evidence the jury "could draw the inference that he (Pauling) was in fact a Communist sympathizer; . . ." (p. 664). Indeed this Court's statement of the evidence in the *Pauling* case would have afforded defendant an excellent basis for a description of the genus follow traveler.

Despite the wealth of material with respect to Communist fellow travelers the book fails to identify a single one nor does it describe how they operate or, in specific terms, how to identify them. (In the appendices two persons are mentioned as sympathizers with Communism, but in the most kindly terms and without specific identification as "fellow travelers". With respect to them defendant uses none of the harsh invective applied to Buckley. Pp. 157, 158). Not only this Court's opinion in *Pauling* but such books as *The Red Decade* by Eugene Lyons and numerous reports by Congressional committees would have supplied the material for a meaningful description of "fellow travelers" of the Communist party, who, as we have said, are the fellow travelers to whom the term has ordinarily been applied.

So far as we are aware, the term "fellow traveler" is rarely, if ever, used in connection with fascism, there not being and never having been a Fascist Party in the United States to fellow travel with. It may have occasionally been so used in the days of Hitler and Mussolini, but rarely, if, at all, since that time. Defendant was forced to resort to the theory that plaintiff was a fellow traveler of the John Birch Society. That Society is of course not a party at all; further, Buckley had excoriated it (PX 43).

Thus when defendant chooses to explain the term "fellow traveler" as used in American polemical discussion by bitter references to Buckley as an alleged fellow traveler of fascism, and without specific and intelligible reference to fellow travelers of the Communist party,* one is forced to suspect bad faith, an ulterior motive. What that motive was, and what gave rise to it, we explain *infra* p. 29.

There is also an indication of malice (in the colloquial sense) in defendant's choice of a Nazi as his illustration of the fellow traveler of fascism. The Nazis represented fascism in its most odious form. Von Ribbentrop, whatever he may have been originally, became a high official of the Nazi Government, a government guilty of unspeakable crimes, and he himself was eventually hanged as a war criminal.

Surely the choice of Von Ribbentrop was a strange one with which to explain to the uninitiated in the year 1969 the function of the fellow traveler in American public life.

The Specific Allegations Respecting Buckley

Having described fellow travelers generally, the author identifies Buckley as "the outstanding representative of the function" (pp. 50-51). We select salient remarks:

> A. "Fascination with brute force and its misuse". No evidence was offered to show that Buckley was fascinated with "brute force", or, indeed, with violence in any form. What Buckley is fascinated by is, on the contrary, words.

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* Such as the change in their attitude towards United States involvement in World War II after the German attack on Russia June 22, 1941. AI, 68.

B. ". . . [He] functions as a deceiver" in that "[h]e appears to be independent but where a major issue is at stake, he follows the party line." No evidence was offered that Buckley or his publications ever deceived anyone, or ever appeared independent but when a major issue was at stake, followed a fascist line. As regards the John Birch Society, he denounced its line as "paranoid." PX43, p. 4.

C. "He gives an aura of respectability to international policies which, without a debonair front, might have been recognized readily for what they are: simple thuggery." No evidence was offered of any simple thuggery in international affairs, or elsewhere, to which Buckley gave an aura of respectability, or in any way approved or condoned.

D. "In America, the outstanding representative of the function [of fascist fellow traveler] is William F. Buckley, editor of the National Review and perennial political candidate."

In short Buckley is fascinated with brute force and its misuse, functions as a deceiver and gives an aura of respectability to simple thuggery, as well as having the other characteristics stated in the passage and in the context described *supra* pp. 10-17 (Buckley was a political candidate only once: He ran for Mayor of New York in 1965. Although the assertion that Buckley is a "perennial political candidate" is perhaps not defamatory, it does show reckless disregard for truth.)

The Alleged Journalistic Misconduct

Having described Buckley as a fascist fellow traveler, the book proceeds to describe his journalistic misconduct, presumably engaged in to advance the cause of fascism.

E. Referring to Buckley's *God and Man at Yale*, "the book has been soundly exposed and condemned by professors and overseers and loyal alumni for falsely twisting facts and for sheer malice."

This comment is apparently based upon a single quotation from McGeorge Bundy in a book with a chapter on Buckley, viz. *Danger on the Right* by Forster and Epstein, DXAC, page 247, and considerably overstates what Bundy actually said. Littell made no reference to the serious and thoughtful discussions by others provoked by the book. PX46. Nor, apart from this one quotation, did Littell offer any evidence in support of this assertion. Buckley, in his own testimony, conceded that the book had received considerable criticism which he identified and, as regards facts, disproved. AI, 76, 89.

F. "The National Review and his syndicated newspaper column 'On the Right' frequently print 'news items' and interpretations picked up from the openly fascist journals and have been important and useful agencies for radical right attacks on honest liberals and conservatives."

The only illustration offered by defendant to prove this assertion was the coincidence of critical comments about himself and IAD on two occasions made by *National Review* and two other publications claimed by Littell to be fascist. The Court reviewed the evidence and found that the accusation materially exceeded anything which Littell honestly believed, AII, 555, 394 F. Supp. 938, 939. Of course in any event, critical comments *per se* do not constitute "attacks"; Littell does not enjoy the principle of lese majeste.

Further, when defendant was called upon to identify the "openly fascist journals" to which he referred, he

testified "primarily the John Birch Society Bulletin, and secondarily the newsletter of the Church League of America. . ." AII, 271.

The Court reviewed the evidence to show the folly of this theory, AII, 551-552; 554-555, 394 F. Supp. 935, 936, as to both the John Birch Society and the Church League of America. As the Court observed, Buckley characterized the publications of the John Birch Society as "paranoid and unpatriotic drivel" (PX43, p. 4). PX43 is a brochure published by *National Review* in 1965 denouncing the Society in a series of articles reprinted from *National Review*. In passing, we note that whatever the vices and absurdities of the John Birch Society, at least so far as the record discloses, it does not advocate or condone the use of force and violence in domestic politics, the key element in defendant's definition of fascism. Nor is it, in so far as disclosed by the record, characterized by the other 15 "chief marks" of fascism listed by defendant (pp. 95-115). Its chief characteristic, as shown by PX43, is a paranoid concern with domestic Communism. Moreover, on the principal political issue of the 1960's, the Vietnamese War, the John Birch Society opposed, or at least belittled the War, whereas Buckley supported it (PX4[illegible], p. 6).*

The charge that the Church League of America was "openly fascist" is absurd. In a moment of what was perhaps inadvertence, defendant testified that the "function of the Church League of America is to attack the ecumenical movement and particularly the American Council of Churches." AII, 302. And in his brief

* In fact "chief mark" of fascism No. 11 is in part: ". . . that the American commitment in Southeast Asia is a result of secret control of public policy by an 'industrial-military complex . . ." (p. 109). This was John Birch theory (PX43, pp. 6-9) which plaintiff always opposed (PX43, pp. 6-9). Buckley's opposition to the Society had in fact begun in 1962 (AI, 229).

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in this Court (pp. 20-21), Littell says he had in mind, as regards the Church League of America, the internal struggle within the Protestant churches rather than Buckley. In any event, although Littell had "a whole file on the Church League of America attacking me, my church, my bishop and other leaders of American protestantism", AII, 78 he did not introduce the file or any publication of the League in which were expressed sentiments corresponding to his definition of fascism (or, so far as we are aware, anybody's definition of fascism). The single issue of *News and Views* which he did introduce was DXAG in which the Church League was critical of Bishop Oxnam, but DXAG is not fascistic, or ever claimed to be. As Littell introduced no other issue of *News and Views*, Buckley introduced his file of *News and Views*, PX109.* Again no sentiment is expressed remotely corresponding with defendant's definition of fascism. PX92 and PX93, also introduced by plaintiff, are issues of *News and Views* critical of defendant but not fascist on any theory, certainly not on defendant's definition.

National Review did print a story of the organization of IAD, the Institute for American Democracy, the body of which Littell was chairman, announced at a press conference and carried in the *New York Times* widely throughout the country (AII, 227). *National Review* also published a report from *News and Views* quoting, or at any rate purporting to quote from "Broadcasting", a trade magazine of the broadcasting industry, that IAD had been organized as a result of "discussion involving 'members of the National Council of Churches and of the Anti-Defamation League of B'nai B'rith" and was a "kind of spiritual successor

* "A pretty total set of their bulletin over the course of a couple of years." AII, 392.

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to the National Council of Civic Responsibility" to condemn extremists of both the right and left. AII, 362-363. The new organization was necessary, it was thought, because the NCCR, organized in September, 1964, had gone out of existence less than a year later. "Broadcasting", as quoted by *News and Views,* stated that the authority for this information was Charles R. Baker, executive director of IAD. (AII, 362-363). Defendant appeared irritated by the connection made between IAD and NCCR, AII, 352, but at no time challenged the accuracy of the quotation from "Broadcasting"; he did think the word "successor" unwarranted. AII, 362.

Defendant even eventually backed down on *News and Views:* ". . . sometimes I am inclined to think so [that *News and Views* is openly fascist] . . . I don't think that I would want to say that or swear that" [that *News and Views* is openly fascist]. AII, 407, 408.

Although claiming that his students had observed Buckley parallels with radical right or openly fascist journals, defendant failed to identify any such. AII, 371.

In explanation of his inability to give specific illustrations of items in "openly fascist journals" printed by *National Review* and "On the Right", Littell explained that he wrote "with flair, you don't stop to have it documented the way you do with a scholarly book . . . But when you are writing with what you think to be a counter crusade, as to speak, and this was the Church struggle that I was living with, you don't stop—you couldn't write with life and flair if you stopped to do that . . . You have to simply write." AII, 366. Considering the fact that the suit was brought in July, 1970 and was tried for four days in April, one day in May, four days in June and three

days in December, 1974, AI, 1 and that Littell had a file on Buckley which he had been keeping since 1961 or 1962 (AII, 385), as well as a file on *News and Views* (AII, 78), it is indeed remarkable that he was unable to illustrate his specific factual assertions, if it were possible to do so. This inability to illustrate suggests that it was malice, rather than "flair" with which Littell was writing.

G. "Buckley has been caught out with misquotations (with quotation marks!) and for repeating radical right malice and rumor, but never admits a mistake or apologizes to the victims."

The Court apparently did not regard these statements as defamatory. The one respecting misquotations is explained by Buckley at AI, 85, line 22 to AI, 89. We refer the Court to that explanation. As the importance is minimal and the explanation detailed, the matter does not call for exposition in this brief. Buckley introduced in evidence a number of admissions of mistakes and apologies that had been made by *National Review*. PX44, A-L. Of course any publication makes an occasional mistake and reputable publications will correct them with appropriate comment.

H. "Like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and nothing else to do. Reynolds won his suit, of course, but it took all his time and resources for most of three years and he died shortly thereafter."

The Court's discussion of this assertion is so detailed, AII, 556, 394 F. Supp. 940, that our own discussion can be cut short. The simple fact is, as Littell

finally admitted at the cited page of the Court's opinion, that he did not believe that Buckley lied day after day about particular people. The attempts in Littell's brief to analogize Buckley's comments on Martin Luther King to Pegler's lies "day after day" about Reynolds are to be noted. In fact, in the course of six years Buckley commented on King on three occasions, each two years apart, AII, 555, 394 F. Supp. 939. The accuracy of the facts stated in these comments is not challenged. As for the other people mentioned, there can be no suggestion that Buckley went after them "in obsessive pursuit", as asserted by Littell.* AII, 417. They were rarely mentioned more than once, and then only by political characterizations.

Buckley illustrated his admission that he had waged campaigns against "lots of people" by his continued criticisms of George McGovern when McGovern ran for president of the United States. AI, 100. The allegation that he "goaded" Linus Pauling is based upon a single *National Review* editorial entitled "Are you being sued by Linus Pauling", written when Buckley "reached the conclusion that Linus Pauling was attempting to intimidate his critics by profligate use of the courts." AI, 101. This editorial is published in *Pauling* v. *National Review,* 49 Misc. 2d 975 (Sup. Ct. N.Y. 1966), at 977. It can not be described as "lying day after day in his column." It was, as the Court's statement at 49 Misc. 2d at 977 shows, written after receipt of a letter from Pauling's lawyer that he was about to sue Buckley for libel by reason of an article, or editorial, about Pauling carried by *National Review* a few months earlier and printed at 49 Misc. 2d 976.

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* Littell apparently had primarily in mind a single article published June 29, 1957, referring adversely to several of his friends. AII, 419 (PX65).

"Buckley As Libeler"

In his Statement of Facts, p. 21, Littell has a section entitled "Buckley as Libeler." The apparent purpose of this section is also to support defendant's claim that Buckley "lied day after day."

The facts respecting libel actions against Buckley are these:

> No action has ever been brought for anything he has ever said in his column or on "Firing Line."
>
> In July, 1962, *National Review* published an editorial, written by James Burnham, entitled "The Collaborators" and saying in substance that a number of people were Communist sympathizers. Two of these, Professor Fowler Harper and Professor Linus Pauling, subsequently brought separate libel suits. AI, 183-185; cf. also *Pauling* v. *National Review*, 49 Misc. 2d 975 (1966), stating the facts. Pauling's complaint was dismissed at the close of his case on the basis of *New York Times*, Pauling having offered no evidence of "actual malice." The decision was affirmed by the Appellate Division without opinion, and again in a brief opinion at 22 N.Y. 2d 818 (1968). Harper died pending the trial; *National Review* settled with his widow for $13,000 on advice of counsel that the widow "would have been a distracting presence in the courtroom for reasons one needn't belabor." AI, 241. Buckley flatly rejected a proposal that he apologize to the widow. *Ibid.*
>
> The *Pauling* case went to trial in 1966. The evidence was approximately the same as that which this Court had held in 1964 in a case brought by Pauling against the *New York Daily News* warranted a jury's inference that Pauling was a Communist sympathizer. This

Court reviewed the evidence, and if it be regarded as relevant, the present Court may examine that review to determine whether Buckley is subject to criticism because he published an editorial drawing the same inference that this Court had held that a jury was entitled to draw. *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 664 (2d Cir. 1964).

An unidentified lawyer in New Jersey, sued Buckley for libel charging that an article by him in *Esquire* magazine on the Edgar Smith case failed to mention this lawyer's contribution to that case. The complaint, according to the record, was "dismissed". AI, 185. (If counsel may correct the record, the complaint was discontinued without concession by Buckley.)

In May, 1969 Buckley sued Gore Vidal for libel. AI, 189. Vidal counterclaimed for libel, a counterclaim that was dismissed on motion for summary judgment. *Buckley* v. *Vidal*, 327 F. Supp. 1051 (S.D.N.Y. 1971). Littell makes the point that the dismissal was after his book had been written, but also, for that matter, so was the filing of the counterclaim on August 1, 1969. 69 Civ. 1933 (docket of the United States District Court for the Southern District of New York). *Wild Tongues* was finalized within "two or three weeks of May, 1969". AII, 46.

"Two or three years ago", i.e., before the trial of this case in 1974, *National Review* was threatened with suit by an organization called "Liberty Lobby" because *National Review* published an article exposing Liberty Lobby as fascist and more or less fraudulent. Buckley testified that its journal known as "Liberty Letter" was "openly fascist". AI, 231-232. *Wild Tongues* describes Liberty Lobby and Liberty Letter as "radical right." P. 134. Liberty Lobby also publishes a paper called the "Washington Observer". The

"Washington Observer" "has long since concluded" that Buckley is a "Jewish communist Zionist plot." I, 32.

Considering that Buckley writes or controls a magazine, a syndicated column, a TV show and a book publishing company, has published ten books, written numerous magazine articles and delivers 50 to 60 lectures annually (appellant's brief, p. 6), Buckley's libel record is, we submit, excellent. He has never lost a libel case and the only libel suit which he ever settled, the Harper case, related to an editorial written not by himself but by James Burnham, a distinguished political writer. *(The Managerial Revolution, Liberation or Containment, Suicide of the West.)* Concededly Buckley knew of and acquiesced in the publication.

POINT V

Littell Knew That What He Said and Wrote Was False, Or In "Reckless Disregard of Truth."

Under the well-known doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), as amplified in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), neither a public official nor a public figure may recover for defamation without proof of "actual malice" on the part of the defendant, "actual malice" being defined as falsehood or reckless disregard of whether what was said was true or false. The meaning of "reckless disregard" has been discussed in several subsequent cases of which the most recent and authoritative is *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). In that case the Court said at p. 731:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published

with a belief that the statements were true. *The finder of fact must determine whether the publication was indeed made in good faith.*" (Emphasis supplied)

In this instance the finder of fact has determined that the publication was not in good faith and has done so on overwhelming evidence that admits, we submit, of no other conclusion. Indeed, as already noted, defendant formally admits in his brief that "he did not believe that what he said was true as regards the allegation that Buckley was a fellow traveler of fascism". Brief, p. 13. This admission would seem to carry with it the admission that facts stated in support of the allegations were also false.

Defendant, as has already been observed, purports to be an expert in distinguishing primarily for the benefit of the Protestant churches, between "honest conservatives", liberals and totalitarians of both the Communist and fascist variety. *Supra* pp. 8-9.

Until the publication of *Wild Tongues,* although freely mentioning names and having many opportunities to do so, defendant, as we shall demonstrate, never included Buckley, *National Review* or "On the Right" (the name of Buckley's column) among the fascists or their fellow travelers, or even among the "radical right".

The defendant's organization, Institute for American Democracy, issues a publication called "Homefront". The May, 1967 issue of "Homefront" ran an article entitled "Who's Who on the Radical Right". DXF. No mention is made of Buckley or *National Review.*

Wild Tongues lists 16 papers on totalitarianism written by defendant between 1953 and 1969. Appendix 5, pp. 150-151. So far as the record discloses, Buckley is not mentioned in any of these. If defendant had honestly be-

lieved Buckley to be fascist or even radical right, such mention would have been highly appropriate in several of these papers, e.g., "The Challenge of the Radical Right" (1962), and "'Extremism': Its Threat to Democracy" (1968). No such mention has ever been claimed by defendant.

During the year 1964 and for several years thereafter, defendant lectured on an average of twice a day, and at least half of the lectures were on the subject of extremism. The lectures were followed by a question period. AII, 313. During this entire era, whenever Buckley's name came up, he never described him as a fellow traveler of the "radical right". AII, 314. Defendant floundered badly when asked if he had ever on these occasions accused Buckley of the journalistic misconduct alleged on p. 51 of *Wild Tongues*. AII, 316-317.

In Littell's letter of November 21, 1967 to Buckley quoted by the Court at page AII, 394 F. Supp. 937, he said:

> "I appreciated your recent newspaper column attempting to distinguish between honest conservatism and fascist activities."

Again, he wrote Buckley on January 14, 1968 (AII, 553, 394 F. Supp. 937):

> "I have often taken pains in response to questions following public lectures to distinguish your work from that of the fascists . . ."

In considering Littell's good faith, it is also significant that Littell disregarded comment favorable to Buckley in publications on which he says he relied. In *Goldwater* v. *Ginzburg*, 414 F. 2d 324, this Court noted at p. 336, as evidence of bad faith, "that at times he [defendant] would quote one part of an article without quoting another part which might have to qualify or contradict the part quoted".

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For instance, in *Danger on the Right* the authors say (p. 747):

> ". . . [H]e [Buckley] is no anti-Semite and will have no truck with anti-Jewish bigotry."

Defendant nowhere mentions this quotation, although saying that he relied heavily on *Danger on the Right*, AII, 67, 113, 132.

Although it is true that *Danger on the Right* characterizes Buckley as a "leading fellow traveler of the American Radical Right", p. 241, the chapter is mainly devoted to quotations of Buckley's publicly stated political positions. None of these positions, albeit conservative, bear any resemblance to fascism or to fellow travelers of fascism as described in *Wild Tongues*, quoted *supra* pp. 10-17.

If there had been any truth in defendant's charges against Buckley made in *Wild Tongues*, the evidence would unquestionably have been set forth in *Danger on the Right*. The authors of that book were both thorough and unfriendly to Buckley.

The same comments apply to *The Extremists* by Mark Sherwin (DXAE) and *The Further Shores of Politics* by George Thayer (DXAD). Both these books include rather long studies of Buckley and would unquestionably have included evidence supporting Littell's charges if there were any such evidence. The absence of such evidence from these books put Littell on notice that it did not exist. It is evident from these books that the authors were not relying on "flair" but on research (there are, however, inaccuracies in the studies of Buckley by Sherwin and Thayer, but such inaccuracies are irrelevant to this case.)

The Element of Spite

What undoubtedly caused Littell to say what he did about Buckley in *Wild Tongues* arose out of a newspaper article published by the Rocky Mountain News on July 9, 1967, written by reporter Jack Gaskie. This story ran as follows (PX16B):

"Rightists' Rights Wrong, Cleric Says

By Jack Gaskie
Rocky Mountain News Writer

Minneapolis, July 9—Rightwing extremists do not deserve the constitutional protection they now enjoy, delegates to the 185th convention of the National Education Assn. (NEA) were told.

The right wing extremists are actually totalitarians, said Rev. Dr. Franklin H. Littell, president of Iowa Wesleyan College and national chairman of the Institute for American Democracy.

'The immediate problem in America,' he declared, 'is that whereas in the 1930s and early 1940s many self-styled liberals failed to draw the line at communism and fellow traveling, today many self-styled conservatives are failing to draw the line at Fascist-type politics and fellow traveling.'

The right wingers, he said, are not a loyal opposition. 'Their style and their stench are disloyalty.'

For half a dozen years, a panel on extremism has been part of the NEA convention. The concentration has been on extremism on the right on the theory that recent attacks on schoolmen have come from the right rather than the left. The right has been excoriated over the years, but never before in such savage and absolute terms as by Dr. Littell.

He declared that earlier American principles, developed before the emergence of totalitarianism, 'are

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no longer adequate to handle the constitutional threat posed by the enemies of liberty.'

Affirmation of the self-determination of principles was all right in the late President Wilson's time, Dr. Littell said—but in an age of enormous concentration of power and instantaneous communication, 'such a principle is untenable.'

He added, 'Our own actions in Guatemala, Vietnam, Cuba and the Near East show that our practical wisdom is better than our theory.'

Similarly, he said, 'It is one thing to affirm the First Amendment liberties in an unqualified fashion in an agrarian society beginning to industralize.

'It is another thing in an age of mass media and electronic opinion forming to sloganize the rights of the Communists or Fascists to the deteriment and destruction of constitutional order and due process.'

He charged that liberals who simply regard the actions of the right wing extremists as vulgar or indecent, but protected by the Constitution, 'abet irresponsibility and aid the flesh eaters.'

The extremists, Dr. Littell said, should be thrown out of whatever groups they are in—churches, synagogues, political parties, school boards, professional organizations.

'The question is not how their opinions can be changed,' he said. 'The question is how soon they can be muted and rendered ineffective.' "

On January 8, 1968 Buckley wrote Littell asking for a correct copy of his address. Littell replied that he had not in fact delivered it because his plane was late (XD to stipulation of facts), but enclosed a copy of the address as prepared (PXA). Littell's reply further said that Gaskie's headline and first sentence were false, but that the quotations were correct (PX15H, PX15B).

Despite defendant's denial of the validity of the headline and the first sentence, we have quoted the story in full because we submit that, contrary to defendant, it correctly summarizes what the ordinary man would deduce from the address. Gaskie, so far as the record discloses, was simply a news reporter, of no particular political affiliation. Although it is true that the address as prepared did include routine denunciation of Communists, the main thrust of the address was unquestionably against "fascists", as reporter Gaskie said. The only specific individuals whom Littell proposed to silence, as set forth in the address itself ("To be very specific: the 'liberty' of Carl McIntire and Billy Jones Hargis and Dan Smoot and Gerald L. K. Smith and Edgar Bundy to lie about my personal life and ministry over more than a thousand radio stations, and to do so with impunity, is a diminution of my rights as an American citizen", PXA, p. 2), and to ostracize, were "fascists".

Subsequently in early February 1968 Buckley wrote a column entitled "Who Are the Totalitarians?" (DXA) commenting on Littell's address. In this column Buckley admitted that Littell had a point in his argument that political extremism be suppressed but regarded it as impractical. "Where do you draw the line [as to whom to suppress]?" he asked. In this column Buckley also made, more or less in passing, some belittling but not defamatory remarks about Littell personally. (Littell was an "abusive rhetorician" and head of an "organization that nobody had ever heard of.")

Defendant then wrote Buckley a bitter letter, saying that he was a liar and a "smart aleck without principles." PX15. Littell was presumably referring to the belittling remarks and also, expressly, to Buckley's failure to say that Littell also opposed Communism.

Did this episode genuinely cause defendant to cease regarding plaintiff as an "honest conservative", as he had done for many years, and to think of him as the Von Ribbentrop of American politics, who was fascinated by brute force and its misuse, gave an aura of respectability to simple thuggery, functioned as a deceiver, an anti-Semite who condoned the burning of synagogues, lied day after day, copied from openly fascist journals, etc.

Obviously not. Rather, it aroused spitefulness, wounded vanity and a desire for revenge. It was for this reason that he introduced Buckley in the role of the Von Ribbentrop of American politics into a book which was in substance a rehash of lectures given for years in which he had, according to his own letters and testimony, never at any time referred to Buckley as a fellow traveler of fascism or even a radical rightist.

Although ill-will and spite do not constitute "actual malice" according to the *New York Times* definition, evidence of spite is admissible and permits an inference of falsehood and/or reckless disregard of truth. *Goldwater* v. *Ginzburg*, 414 F. 2d at 342. Presumably, the rationale is that someone who dislikes another person is the more likely to lie about him and that false and defamatory speech is under such circumstances more probably lacking in good faith.

Also tending to negative good faith is the fact that most of the evidence of alleged fellow traveling relates to the period when defendant did not condemn Buckley. The appearance on a platform with several speakers alleged to have connections with the John Birch Society, the first two comments on Dr. King, the criticism of President Kennedy's handling of the Cuban missile crisis, the endorsement of the Katanga Freedom Fighters and the various other evidences of fascism all occurred before or during

the period in which defendant regarded Buckley as an "honest conservative."

POINT VI

Linn v. *Plant Guard Workers*, 383 U.S. 53 (1966), and *National Assoc. of Letter Carriers* v. *Austin*, 418 U S. 264 (1974), Do Not Impose Upon a Public Figure Plaintiff Burdens Additional to *New York Times* and *Curtis Publishing Co.*

Defendant makes some effort to argue that *Linn* and *Letter Carriers* go further than *New York Times* and *Curtis Publishing Co.*

Both *Letter Carriers* and *Linn* were libel suits brought in the state courts of Virginia arising out of labor disputes. *Linn* turned on this fact, and not on the public or private figure status of the plaintiffs. In *Linn* the Court held that, by reason of federal labor policy, it was required of plaintiff in an alleged libel growing out of a labor dispute, that he meet the actual malice standard of *New York Times*. The case was remanded to the Virginia courts to permit plaintiff to amend his complaint accordingly.

In *Letter Carriers* the Court held that on the evidence the *New York Times* standard had not been met, plaintiff having only been called something that he indeed was according to the dictionary. The actual ruling of the Court is summed up in a concluding paragraph at 418 U.S. 287:

> "This is not to say that there might not be situations where the writing or other similar rhetoric in a labor dispute could not be actionable, particularly if some of the words were taken out of context and in such a way as to convey a false impression of fact. See Greenbelt Cooperative Assoc. v. Bresler, supra at 13, 318 U.S.

> But in the context no such factual representation can reasonably be inferred."

The quotation from *Letter Carriers* at p. 41 of plaintiff's brief, contrary to what the brief says, does not describe protected speech, but rather the characteristics of labor disputes. We have quoted above the actual holding of *Letter Carriers.*

POINT VII

The Factual Determinations Below Were Not Clearly Erroneous, and Therefore May Not Be Reversed.

It is clear that the carefully wrought decision below was amply supported by the record, and is not reversible. The determination of "actual malice" on the part of Littell was indeed required by the evidence presented to the trial court. In any event, the determination of the trial court must be sustained unless "clearly erroneous", under the classic rule embodied in F.R. Civ. Proc. 52(a).

Littell's brief addresses this critical point only in a footnote (p. 36, n.10), where the following is stated:

> "In libel cases appellate courts will 'reexamine the evidentiary basis' of the lower court decision. Time, Inc. v. Pape, supra at 384. The scope of the review in this case is the broadest possible since it was tried to the court."

This is, to be charitable, a very partial statement of the applicable rule. To begin with, Littell's brief omits to state the limited criterion by which such an evidentiary review is to be conducted. The Supreme Court rulings on this subject are aptly summarized in the recent case of *Davis* v. *Schuchat*, 510 F.2d 731 (D.C. Cir. 1975), a case,

like this one, for libel and tried by the court without a jury. The Court said at p. 735:

> "In approaching this reviewing task we are mindful of the Supreme Court's admonitions as to the manner of its performance. In Time, Inc. v. Pape, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971), the Court said (at 284, 91 S. Ct. at 637):
>
> '[In] cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review "the evidence in the . . . record to determine whether it could constitutionally support a judgment" for the plaintiff . . .' (Emphasis supplied).
>
> "As the Supreme Court stated in Time, Inc. v. Hill, 385 U.S. 374, 394, 87 S. Ct. 534, 545, 17 L. Ed. 2d 456 (1967):
>
> 'Where either result finds reasonable support in the record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood.'"

Both *New York Times* and *Pape* were jury cases in which the Court had before it only general verdicts. In *Davis* the Court dealt with a very simple factual issue, *viz.*, whether the defendant had told various people that plaintiff had been "convicted of a felony in New York." In such cases there was more occasion to review the evidence in detail then in the present instance in which the Court made a detailed statement of the facts upon which he reached his decision.

Littell's assertion that "the scope of the review in this case is the broadest possible since it was tried to the court" flies in the face of Fed. R. Civ. Proc. 52(a), which unequivocally provides:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereupon, and judgment shall be entered pursuant to Rule 58.

* * *

"*Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" (Emphasis added.)

The Federal courts have reiterated, time and again, the extraordinary deference to be accorded to findings of fact by trial judges under the "clearly erroneous" standard.

As the Supreme Court stated in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969):

"In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed'."

As Rule 52 makes clear, furthermore, special recognition must be accorded by a reviewing court to determinations as to the credibility of witnesses by the trial judge. In

this case, the trial court explicitly confirmed in two instances that the testimony of Littell as to the crucial issue before the court was "difficult to credit" (AII, 548, 549; 394 F. Supp. at 933, 934), a polite way of saying that the Court did not believe him.

It would be totally inappropriate for this Court to substitute its judgment on this matter for that of the Court below. As Judge Learned Hand stated in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945):

> ". . . [U]pon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable', except in the most exceptional cases."

This Court has applied the rule in at least the following cases: *U.S. ex rel. Fitzgerald* v. *LaVallee*, 461 F.2d 601, 604 (2d Cir. 1972), *cert. denied*, 409 U.S. 885 (1972); *U.S.* v. *Diapulse Corp. of America*, 457 F.2d 25, 30-1 (2d Cir. 1972); *U.S. ex rel. Jefferson* v. *Follette*, 438 F.2d 320, 322 (2d Cir. 1971); *Vaccaro* v. *Alcoa Steamship Co.*, 405 F.2d 1133, 1138 (2d Cir. 1968); *Banks* v. *U.S.*, 267 F.2d 535, 539 (2d Cir. 1959); *Lee Dong Sep* v. *Dulles*, 220 F.2d 264, 265 (2d Cir. 1955); and *Hedger* v. *Reynolds*, 216 F.2d 202, 203 (2d Cir. 1954).

Finally, this Court has applied this rule to the exact question presented in the instant case;—whether a party before the trial court had "knowledge" of a matter relevant to that court's determination. *Menendez* v. *Saks and Co.*, 485 F.2d 1355, 1367-8 (2d Cir. 1973), *cert. granted sub nom. Alfred Dunhill of London, Inc.* v. *The Republic of Cuba*, 416 U.S. 981 (1974), *reargument granted*, 95 S. Ct. 2624 (1975). See also *Hurley* v. *Southern California Edison Co.*, 183 F.2d 125, 130 (9th Cir. 1950); and *Wertz* v. *National City Bank*, 115 F.2d 65, 68 (7th Cir. 1940).

THE COURT'S CONSTRUCTION OF THE DEFAMATORY LANGUAGE IS CONTROLLING.

This is a diversity case. Under New York law, issues as to the meaning of language alleged to be defamatory are for the jury. *Nichols* v. *Item Publishers, Inc.*, 309 N.Y. 596, 601 (1956).

> ". . . [A]nd if any common sense construction of what was written justifies or supports a defamatory meaning, it will be for the jury, not the court on motion, to decide whether or not the writing was defamatory."

To the same effect are *Mencher* v. *Chesley*, 297 N.Y. 94, 102 (1947); *Macy* v. *World-Telegram Corp.*, 2 N.Y. 2d 416, 419-420 (1957); and *Karapodis* v. *Brooklyn Spectator, Inc.*, 287 N.Y. 17, 21 (1941), and cases there cited.*

Of course we do not doubt that an appellate court has the authority to decide whether or not there is any "common sense construction" which "supports a defamatory charge", *Julian* v. *American Business Consultants*, 2 N.Y. 2d 1 (1956). However, once that point is passed, as it clearly is in this instance, the determination is for the trier of fact. In this case, the Court's conclusion that appellant intended to say what his words so clearly meant, despite his testimony to the contrary, surely is not to be set aside by an appellate court.

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* *Fleck Bros. Co.* v. *Sullivan*, 385 F.2d 223 (7th Cir. 1967), cited by Littell as stating a First Amendment requirement, was, as the opinion expressly states, an application of the "Illinois innocent construction rule." Of course New York law applies here.

POINT VIII

Plaintiff, Having Shown Actual Malice, Is Entitled to Punitive Damages. *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), Has Not Been Overruled by *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), the Supreme Court held that a public figure could collect punitive damages on a showing of actual malice (four judges held that a lesser requirement was sufficient).

Butts was followed by this Court in *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d Cir. 1969).

Defendant appears to admit that the foregoing statements are correct, but argues that they have been overruled by *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

In the earlier case of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), the Court had held in a plurality opinion that a private person involved in a matter of public interest must prove *New York Times* malice to succeed. A majority concurred in the result but not in the rationale of the plurality.

Gertz was a figure of questionable status involved in a matter of public interest. Meanwhile the membership of the Court had changed.

The majority opinion in *Gertz* dealt with these subjects:

1. On the facts, was Gertz a private or a public figure? The Court held that he was a private figure despite his involvement in a matter of public interest. 418 U.S. 351.

2. If a private figure, what standard of proof was necessary to establish liability? The Court held that

"a less demanding (than malice) showing" (apparently negligence, 418 U.S. 333, 348) would suffice.

3. If *New York Times* did not apply, to what damages was plaintiff entitled? The Court held that he was entitled to "actual injury", a new concept which the Court did not specifically define, 418 U.S. 349-350, despite a vigorous dissent by Justice White, 418 U.S. 369-404.

There is not a word in *Gertz* which departs from or even questions the rulings in *Butts* and *Goldwater* that punitive damages may be awarded in cases of actual malice. Indeed the danger seen in punitive damages, as explaining the doctrine of *New York Times,* was that damages were fixed by juries, 418 U.S. 450. The damages here were fixed by a judge. The possible evil seen by the Court in punitive damages is thus not present here. In any event, the Court did not question that, when actual malice is shown, punitive damages are recoverable.

The quotations from *Gertz* relied on by plaintiff were in explanation of the necessity of proof of actual malice in public official-public figure cases.

Davis v. *Schuchat,* 510 F. 2d 731 (D.C. Cir. 1975), considered and rejected the precise position urged by Littell on this appeal, to a considerable extent in reliance on the opinion of this Court in *Goldwater.** In *Davis,* as here, a "public figure" plaintiff was awarded compensatory damages of one dollar plus punitive damages by a district judge. In *Davis,* as here, the defendant contended on appeal that *Gertz* precluded an award of punitive damages. In rejecting this assertion and affirming the opinion below,

* See also *Drotzmanns, Inc.* v. *McGraw-Hill, Inc.,* 500 F.2d 830, 836 (8th Cir. 1974).

the Court of Appeals for the District of Columbia held (510 F. 2d at 737-8):

> "Whatever doubts may have arisen about the propriety of punitive damages from the multifarious expressions on the subject in past Supreme Court opinions, Gertz appears to have linked the propriety of punitive damages to the rigors of the New York Times definition of actual malice. Since liability in the case before us was found by reference to that standard, there appears to be no constitutional defect in the punitive damage award in this case. Appellee was, of course, found to be a public figure, as distinct from the private person involved in Gertz. But the majority opinion in Gertz is at least subject to the implication that violation of the exacting standard of New York Times justifies the award of presumed or punitive damages even in the case of a public official or public figure.
>
> It is arguable also that this reading of Gertz does not change the law on damages under New York Times as it existed before. There was an inconclusive discussion of the availability of punitive damages in Rosenbloom, which appears to have ended in the view that a requirement of malice was preferable to a limitation on damage awards to protect 'public figures.' We do note, however, that in Curtis Publishing Co. v. Butts, the sole Supreme Court case in which a damage award has been upheld in this field, the Court permitted punitive damages.
>
> The Second Circuit has, prior to Gertz directly considered the problem, and has determined that punitive damages are appropriate and permissible where malice, as defined by New York Times, is shown. Goldwater v. Ginzburg, 414 F. 2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed. 2d 695 (1970)

(awarding $1.00 in compensatory damages and a total of $75,000 in punitive damages). We believe that their reasoning is correct, recognizing as it does, the purpose of punitive damages as '(1) the protection of the libeled individual's reputation and (2) the protection against like abuse of all other persons similarly situated' Id. 414 F. 2d at 341 (citing Curtis Publishing Co. v. Butts, supra, 388 U.S. at 161, 87 S. Ct. 1975, 18 L.Ed. 2d 1094), see also Afro-American Publishing Co. v. Jaffee, 125 U.S. App. D.C. 70, 366 F. 2d 649 (1966).

As Justice Brennan recognized in Rosenbloom, the First Amendment requires that press and speech comment on matters of public interest be given the wide latitude granted by the Times standard. Once that latitude is exceeded, however, we fail to perceive that any further purpose is served by eliminating traditional punitive damages, which have always been subject to correction for excessiveness. Punitive damages are allowed because the civil law has long recognized that in certain situations deterrence can better be achieved through modification of the civil awards than through a requirement of criminal sanctions." (Footnote omitted.)

POINT IX

The Punitive Damages Awarded Below Were Reasonable and Well Within the Discretion of the Trial Court.

Amazingly, Littell contends in his brief that the damages awarded below ($1.00 compensatory damages, $7,500.00 punitive damages) constitute "staggering money damages" (brief for defendant-appellee, p. 35) and a "confiscatory" award (ibid., p. 73) which should be reduced,

if not reversed. We need not tarry long with this transparent exercise in hyperbole.

The punitive damages awarded below were quite modest, compared with awards previously affirmed by this court and the United States Supreme Court. In *Curtis* v. *Butts*, 388 U.S. 130 (1967), the Supreme Court affirmed an award of $400,000.00 in punitive damages. This court affirmed punitive damages awards totaling $175,000.00 in *Reynolds* v. *Pegler*, 223 F. 2d 429 (2d Cir. 1955), *cert. denied*, 350 U.S. 846 (1955), and an award of $75,000.00 in punitive damages in *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

Finally, Rule 52(a) of the Federal Rules of Civil Procedure requires that a determination of damages be affirmed unless "clearly erroneous". *Hayes* v. *United States*, 367 F. 2d 340, 341 (2d Cir. 1966). See also *Riss* v. *Anderson*, 304 F. 2d 188, 198 (8th Cir. 1962), where in an opinion by Judge (now Justice) Blackmun, the Court applied the same rule in affirming a determination of punitive damages by a district judge in a defamation case tried without a jury.

CONCLUSION

In the *Greenbelt** case the Court held that in political commentary an extremely harsh characterization is not libelous provided the facts upon which it is based are truthfully stated. Defendant's thesis seems to be that in political discussion harsh commentary is warranted even if the facts stated are known to be false or spoken in

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* See Point IV, *supra* p. 8.

reckless disregard of the truth. Such a thesis has no support.

The judgment should be affirmed.

New York, N.Y.
January, 1976

Respectfully submitted,

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